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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by Pacific Bell Telephone Company
d/b/a SBC California (U 1001 C) for Arbitration
of an Interconnection Agreement with MCI metro
Access Transmission Services LLC (U 5253 C)
Pursuant to Section 252(b) of the
Telecommunications Act of 1996.

Application 05-05-027
(Filed May 26, 2005)

**ARBITRATOR'S RULING DENYING
MOTION OF PAC-WEST TELECOMM, INC. TO INTERVENE**

On July 10, 2006, Pac-West Telecomm, Inc. (Pac-West) moved to intervene. No responses have been filed. Pac-West's motion is denied.

The Commission's rules clearly provide that "only the two parties involved in the arbitration will be granted party status." (Rule 3.15, Resolution ALJ-181.) The two parties involved in the arbitration here are Pacific Bell Telephone Company d/b/a SBC California (SBC-CA, also known herein as AT&T) and MCI metro Access Transmission Services LLC (MCI, also known herein as MCI). Pac-West is not one of the two parties involved in this arbitration.

Pac-West "requests a waiver of Rule 3.15" so that it may be made a party. (Pac-West Motion, footnote 7 at p. 4.) The request for waiver is denied.

The Commission adopted its rules on party status and public participation after carefully balancing the rights of involved parties, interested parties, and all members of the public. (See, for example, Resolution ALJ - 168, Section 1.2, p. 2.) These rules carefully balance the rights of the negotiating parties to an equitable

and efficient arbitration process pursuant to the Telecommunications Act of 1996 with the ability of non-negotiating parties and members of the public to file meaningful comments within a reasonable structure and timeframe. In particular, interested parties and members of the public upon request

“will be placed on the ‘Information Only’ portion of the service list; ...the general public is permitted to attend arbitration hearings; ...any member of the public may file comments on the Draft Arbitrator’s Report (DAR); ...any member of the public may file comments concerning the arbitrated agreement...”
(Resolution ALJ-181, Rules 3.15, 3.16, 3.19 and 4.2.1.)

Pac-West does not convincingly show that it needs party status here to make its concerns known. Rather, Pac-West, as an interested party and member of the public, has had adequate and reasonable opportunity to file comments on both the DAR and the arbitrated interconnection agreement (ICA).¹ This includes comments on what Pac-West believes to be technical, factual, policy or legal errors.

Pac-West’s motion does not identify any deficiency in the record here that Pac-West would seek to remedy. Rather, all necessary facts have been presented in testimony and discussed in briefs.² As a member of the public, Pac-West had

¹ The DAR was filed on January 20, 2006. Comments on the DAR were due within 10 days, by January 30, 2006. (Rule 3.19, Resolution ALJ-181.) The arbitrated ICA was filed on June 14, 2006. Comments were due within 10 days, by June 24, 2006. (Rule 4.2.1, Resolution ALJ-181.)

² Pac-West states that the Final Arbitrator’s Report (FAR) contains legal error on the issue for which Pac-West seeks party status here. Pac-West says it would seek to present arguments in support of claiming the FAR commits legal error, using the same arguments it makes in a brief filed May 12, 2006 in Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044. Pac-West’s motion does not claim that its

Footnote continued on next page

that entire record for the purpose of comments it was eligible to file on the DAR or the arbitrated ICA.³

Pac-West says it “seeks to intervene as a party in this proceeding to ensure that it may appeal the decision of the Commission...” (Motion, p. 4.) As explained more below, Pac-West fails to present a convincing case that it should be granted party status here so it may appeal the Commission’s decision in this proceeding. Rather, Pac-West may pursue relief as needed in the proceeding in which Pac-West already is a party. That is, Pac-West does not need party status here to protect the rights it says it seeks to protect via party status in this matter.

Pac-West describes the other proceeding as a Pac-West initiated dispute resolution in the Local Competition Docket, R. 95-04-043/I. 95-04-044. Pac-West states it brought the dispute resolution action against AT&T pursuant to the terms of its existing ICA with AT&T. The issue there is discussed by Pac-West as the same or substantially similar to the issue which prompts Pac-West to seek party status here. Pac-West says that AT&T urges the Commission in the dispute resolution matter to defer action there pending the decision here (in Application (A.) 05-05-027), and to apply the same outcome for consistency. In particular, Pac-West argues that:

“... by urging imposition of the outcome here on Pac-West’s existing interconnection agreement with AT&T, AT&T seeks to have the Commission avoid analysis of this issue in the Pac-West dispute resolution case, thus depriving Pac-West of a full opportunity to advocate its position.” (Motion, pp. 3-4.)

argument of legal error in the other case contains anything not already in the record here.

³ Moreover, in its comments Pac-West could argue its own legal theories.

Pac-West concludes that if AT&T prevails, Pac-West's rights will be negatively affected.

To the contrary, Pac-West does not show that it cannot argue in the dispute resolution matter against AT&T's position regarding deferral and consistent treatment. Rather, Pac-West may carefully argue its concerns there. If Pac-West's concerns are reasonable, the Commission will allow the necessary analysis of issues as they pertain to Pac-West. Moreover, Pac-West fails to convincingly show that the outcome here will control the outcome in its dispute resolution matter. Rather, that is a decision to be made in the other proceeding, not here. Thus, Pac-West does not need party status here to protect its rights there.

In further support of its motion to intervene, Pac-West asserts that MCI_m failed in its comments on the DAR to address an issue on which MCI_m did not prevail, and which is the issue that concerns Pac-West here. Pac-West states that:

"Comments and reply comments on the DAR...are the pleadings where an issue being arbitrated would be carefully documented by a party disagreeing with the Arbitrator's initial determination. To fail to uphold a prior position in this context is a clear end of actual adversarial arbitration." (Motion, p. 2.)

"The absence of any opposition by MCI to the findings in the DAR on this issue, particularly in light of its earlier assertions and subsequent negotiations with AT&T, constitutes a fundamental change of position." (Motion, p. 5.)

Pac-West is incorrect. Comments on the DAR are to focus on factual, legal and technical errors in the DAR, and comments are not to reargue positions already stated in briefs. (Rule 3.19, Resolution ALJ-181.) Each party's case on an issue is made in its direct testimony, with application of law in briefs. Its case is not made in comments on the DAR. A party may decline to address an issue in

its comments on the DAR because there are no material factual, legal or technical errors that have not already been argued in briefs. This does not necessarily mean that the party no longer feels strongly about the issue. It certainly does not mean that this is the end of adversarial arbitration.⁴

Pac-West states “other than by silence, MCI did not notify the Arbitrator that it no longer opposed AT&T’s position on this issue.” (Motion, p. 6.). Pac-West is correct. MCIIm has not notified the Commission that this issue is no longer one of the 80 presented for arbitration. As explained above, this is not a basis upon which to conclude that MCIIm no longer opposes SBC-CA’s position.

In the alternative to being granted party status, Pac-West asks that the Commission find the section of the ICA at issue here to be a negotiated, not an arbitrated, provision. The alternative treatment is not adopted in this ruling. Pac-West correctly states that neither MCIIm nor SBC-CA have notified the Commission that this issue is no longer one of the 80 presented for arbitration.

Finally, Pac-West asks that the Commission clarify that the ICA resulting here between SBC-CA and MCIIm will have no bearing on the outcome in the pending Pac-West dispute resolution proceeding. This clarification is not adopted in this ruling. Pac-West clearly shows that SBC-CA has raised the issue

⁴ According to Pac-West, MCIIm limited its comments on the DAR to five issues, even though the DAR ruled in SBC-CA’s favor on 42 issues. Also, the DAR adopted a compromise or other outcome on five issues. Thus, at least in theory, there was a total of 47 issues on which MCIIm might comment (42 on which SBC-CA prevailed and five compromise or other outcome). Failure to comment does not mean that MCIIm agreed with the outcome on the other 42 issues (47-5). Similarly, MCIIm prevailed on 33 issues, with five compromise or other outcome, for a total of 38 upon which SBC-CA in theory might have commented. SBC-CA commented on 18 issues. Failure to comment does not necessarily mean that SBC-CA agreed with the outcome on the other 20 issues (38-18).

of the degree to which the ICA adopted here should or should not be used to guide the outcome in the dispute resolution matter. There is no reason to prejudice here the decision of the Administrative Law Judge and/or Commission there.

IT IS RULED that the July 10, 2006 motion of Pac-West Telecomm, Inc. to intervene is denied.

Dated July 17, 2006, at San Francisco, California.

/s/ BURTON W. MATTSON

Burton W. Mattson
Administrative Law Judge
Arbitrator

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Dated July 17, 2006, at San Francisco, California.

/s/ JOYCE TOM

Joyce Tom

N O T I C E

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Last Update on 14-JUL-2006 by: SMJ

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